



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of:       Calculus, Inc.--Request for Reconsideration  
File:             B-228393.2  
Date:             December 7, 1987

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### DIGEST

Dismissal of protest for protester's failure to furnish the required bid bond is affirmed. Bid guarantee provision in solicitation is a material requirement which must be met at the time of bid opening. Bid guarantee which was not submitted within the time limits required by the Federal Acquisition Regulation (FAR), although protester offered to submit it upon funding and award of a contract, cannot be accepted as a late bid bond within the meaning of the FAR.

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### DECISION

Calculus, Inc. requests that we reconsider our dismissal of its protest challenging the rejection of its bid as nonresponsive for failure to furnish the required bid bond under solicitation No. DABT51-87-B-0251, issued by the Department of the Army for replacement of compressed air systems. See Calculus, Inc., B-228393, Oct. 21, 1987, 87-2 CPD ¶ 11.

We affirm our decision.

Calculus contended that a bid guarantee should not have been required because no funds had yet been appropriated for the contract. According to Calculus, it is against Department of Defense (DOD) regulations to require a contractor to make expenditures for a contract for which funds have not been appropriated. Calculus also asserted that it was willing to submit the necessary bond, once funds were appropriated and the contract awarded. We found that the Army properly rejected Calculus' bid as nonresponsive based on its failure to submit a bid bond with its bid. We also held that notice in a solicitation that funds are not presently available for a contract does not relieve a bidder from submitting a bid bond required by the terms of the solicitation.

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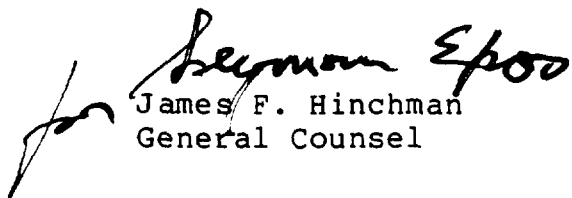
In its request for reconsideration, Calculus again maintains generally that it is against DOD policy to require a contractor to make an expenditure such as that required to obtain a bid bond in order to be eligible for a contract for which funds have not been appropriated. As in its original protest, however, Calculus fails to cite any specific regulation or other policy supporting its position, and we are unaware of any. As further support for its position, Calculus states that a bid bond is not required for this contract under the Miller Act, 40 U.S.C. §§ 270a-270f (1982). The Miller Act requires awardees to furnish performance and payment bonds under federal construction contracts in excess of \$25,000; under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.101-1 (1986), bid bonds are mandatory where performance and payment bonds are required. Even assuming, as Calculus argues, that the Miller Act performance and payment bond requirements do not apply in this case, however, the contracting agency is not precluded from requiring a bid bond, and when it does so, bidders are required to furnish it. Pine Street Corp., B-210599, Feb. 17, 1983, 83-1 CPD ¶ 168.

Calculus also reiterates its original contention that it is entitled to award as the lowest priced, responsible bidder, and that its lack of a bid bond did not make its bid nonresponsive. As we stated in our prior decision, however, the bid guarantee provision in the solicitation is a material requirement which must be met at the time of the bid opening. A bid which does not include the bid bond is nonresponsive and cannot be made responsive by the submission of the bond after bid opening. Harrison Contracting, Inc., B-224165, Oct. 7, 1986, 86-2 CPD ¶ 402.

Finally, Calculus contends that its offer to submit a bid guarantee upon funding and award of the contract should be accepted under FAR, 48 C.F.R. § 28.101-(4)(d), which authorizes a contracting agency to accept a bid guarantee which is received late if it meets the conditions for acceptance of a late bid set out in FAR, 48 C.F.R. § 14.304. However, FAR, 48 C.F.R. § 14.304 limits consideration of late bids to those sent by registered or certified mail not later than 5 calendar days before the specified date of receipt, or those sent by mail when it is determined that late receipt is due solely to government mishandling after receipt at the government installation. Neither of these circumstances exists here. Calculus did not submit the bid bond within the time specified by the regulations; in fact, it has not submitted the bid bond at all, and its offer to submit a bid bond at some future date upon funding and award

of the contract clearly does not fall within the cited FAR provisions regarding acceptance of a late bid bond.

We affirm our prior decision.

James F. Hinchman  
General Counsel